IN THE

Supreme Court of the United States

October Term, 1951

No. 543

ON LEE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

There was no opinion in the District Court.

The affirmance in the United States Court of Appeals for the Second Circuit was by a divided court. Swan, *Ch.J.*, wrote the prevailing opinion in which Clark, *C.J.* concurred. Frank, *C.J.*, wrote the dissenting opinion. These opinions are reported at 193 F. 2d 306, 311 and are also printed at pp. 43 and 52 of appendix annexed to original petition for certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on November 21st, 1951. The petition for a writ of certiorari was filed January 18th, 1952 and certiorari was granted March 3rd, 1952.

The jurisdiction of this Court is invoked under Rule 37(b) of the Rules of Criminal Procedure and Title 28, §1254, United States Code.

Questions Presented

In the instant case, was it not prejudicial error to admit evidence of conversations allegedly held some six weeks after petitioner's arrest, between petitioner and a special employee of the Government, one Chin Poy, the conversations taking place in petitioner's combined home and place of business at Hoboken, New Jersey, Chin Poy having entered the premises by stealth and subterfuge and remaining contrary to the wishes of petitioner (R. pp. 295-6, 8) and carrying concealed upon his person a microphone and a miniature radio transmitter thus causing the conversations to be radioed to the world outside of petitioner's home and place of business where it could be picked up by a radio receiving set operated by a United States Treasury Department Narcotic Agent upon the same wave length as the transmitter (R. pp. 163-4), said agent being the only one who testified in respect to the alleged conversations, Chin Poy, the special employee who allegedly held the conversation with petitioner not being produced by the government in the Court below and no excuse or explanation being offered for his absence (R. p. 178), the Narcotic Agent's testimony being based upon alleged refreshing of his memory by the use of secondary evidence consisting of notes claimed to have been

prepared by the absent special employee, Chin Poy, some time subsequent to the event (R. pp. 147-50). Should not this evidence have been excluded, having been obtained:

(a) In violation of petitioner's Constitutional Rights guaranteed him under the Fourth and Fifth Amendments of the Constitution of the United States?

(b) In violation of the provisions of Section 605 of Title 47 of the United States Code, the Federal Communications Act?

Should not this evidence also be ruled inadmissible by reason of the inherent power of this Court to formulate rules of evidence for Federal Criminal Trials, guided by the consideration of justice?

Objection to the admission of the said evidence was duly taken (R. p. 104).

Another question presented in the instant case is: was it not prejudicial error to admit evidence of accusatory and incriminating admissions alleged to have been made by a co-defendant subsequent to arrest and in the presence of the petitioner, to which petitioner made no reply, said evidence being received by the trial judge on the theory that since the petitioner had not denied the statement he had, by his silence, admitted what was not denied (R. pp. 73-80, 102-3, 136, 137-9, 217, 219-222), particularly where it affirmatively appears in the Record in the instant case that subsequent to arrest and prior to the making of the alleged accusatory statement by the co-defendant, the petitioner had denied any connection between himself and the opium sold and delivered by the co-defendant to the federal narcotic agent? (R. pp. 53, 63). Objection to the admission of this evidence was taken timely (R. pp. 73-4).

Was this error corrected by the erroneous charge of the trial court? (R. pp. 360-1).

Would the charge of the trial court, even if accurate which it was not in the instant case—correct and cure the harm done by the erroneous admission of this evidence coupled with long colloquy and discussion in and out of the presence of the trial jury?

Constitutional Provisions and Statutes Involved

Constitution of the United States, Amendment 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment 5:

> "* * *; nor shall be compelled in any criminal case to be a witness against himself, * * *."

Section 173, Title 21, United States Code:

> "173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.
>
> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe * * *."

Section 174, Title 21, United States Code:

"Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

"174. Same; penalty; evidence.—If any person fraudulently or knowingly imports or brings any narcotic drug into the United States, * * * contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years * * *."

Title 26, Section 2553(a), United States Code:

"§2553. Packages—(a) General requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *."

Title 26, Section 2554(a), United States Code:

"§2554. Order forms—(a) General requirement. It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

Title 18, Section 371, United States Code:

"§371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 47, Section 605, United States Code is set forth at length in footnote 15, pages 37-8 herein.

STATEMENT

Petitioner was arrested on Sunday, February 12th, 1950 in Chinatown in the City of New York along with his co-defendant, Gong Len Ying[1] by Federal Narcotic Agents assisted by New York City Detectives. Petitioner resides and works in Hoboken, New Jersey immediately across the Hudson River from New York City. He has lived there for over twenty years with his wife and son and runs a chinese hand laundry working fifteen hours a day, six days a week.

The government charged him with participating in the sale of a pound of opium made on January 22nd, 1950 by Ying to Federal Narcotic Agent Gim and with conspiracy to sell opium. The co-defendant Ying pleaded Guilty to the indictment (R. p. 203) and was one of the principal witnesses for the Government on the trial of petitioner. As a reward for his services the district attorney recommended

[1] Hereinafter referred to as "Ying".

that he be given a suspended sentence and he was sentenced to six months imprisonment (R. p. 385).

Ying was in the business of selling laundry supplies and chinese food-stuffs to operators of chinese laundries in New Jersey (R. p. 222). He owned and operated his own truck for his business.

On Sunday, January 22nd, 1950 he was introduced to Agent Gim in Chinatown and after some discussion agreed to sell to him a pound of opium. Collecting in advance he claimed that he then obtained the package of opium from petitioner at 79 Mott St. in New York City (R. p. 204).

His testimony as to other subsequent meetings with Agent Gim was vague and not consistent with that of Gim. He did state that when they met on February 12th, 1950, Gim asked him to get twenty pounds of opium. He called petitioner and asked him to come to New York (R. pp. 213-5). When petitioner arrived they had tea together and he asked petitioner about getting twenty pounds of opium to which he claimed petitioner replied that he didn't know if there was any available (R. pp. 215-6). Petitioner was alleged to have said that if there were any money he would see what could be done. Ying went back and forth between Gim and petitioner several times but no deal was consummated and both petitioner and Ying were placed under arrest when leaving the restaurant (R. p. 217).

Agent Gim testified in detail concerning his meetings with Ying and his purchase of a pound of opium from him for $550.00 on the very first time he met him (R. p. 7). In considering the entire case if is interesting to note that Agent Gim and Ying arrived at a price for the opium after considerable bargaining and bickering and without Ying consulting anyone else (R. pp. 24-5).

Agent Gim never saw the petitioner in any of his transactions with Ying until after the arrest (R. pp. 51-2). This included his meeting with Ying on Sunday, February 12th,

the date of the arrest when he claimed to have had several conferences with Ying concerning the possible purchase of twenty pounds of opium.

Another Federal Narcotic Agent, Lawrence Lee, corroborated Gim's testimony about his dealings with Ying.

After the arrest of petitioner the Government apparently became apprehensive of the fact that their case against him was woefully weak. In an effort to bolster the case they transported one, Chin Poy, a government informer and euphemistically described in the Record as a "special government employee" to Hoboken, New Jersey, on March 30th, 1950 and a subsequent date.

Chin Poy knew petitioner and called at his combined place of business and home in Hoboken for the purpose of attempting to elicit an admission. Petitioner testified that he had nothing to do with Chin Poy and attempted to and did chase him away (R. p. 298).

The Government never called Chin Poy as a witness nor was any excuse offered for the failure to produce him in Court (R. pp. 175-8).

Instead, the trial Judge permitted Agent Lee, over the objection of petitioner's counsel (R. p. 104) to testify that Chin Poy had concealed upon his person a microphone and a radio transmitter and that Agent Lee stood in a vestibule of a building down the street from petitioner's premises and by means of a short wave radio receiving set intercepted the broadcast of the conversations (R. p. 104).

Lee never made any notes at the time nor was any recording device used. He claimed that he did attempt to use a recorder on one of the occasions but that it didn't work (R. pp. 196-7). Lee claimed he was testifying purely from memory refreshed by alleged writings of Chin Poy (R. pp. 109-10, 196-7). Agent Lee was permitted to testify in all as to two conversations had between Chin Poy and peti-

tioner in petitioner's combined home and place of business. Both of these talks allegedly took place more than six weeks after petitioner had been arrested and released on bail. He claimed petitioner admitted to Chin Poy that the opium in question was not his but he represented a syndicate.

During the course of Lee's cross-examination he admitted that after the arrest he had gone to 79 Mott Street, in New York City, with petitioner, where Ying claimed he had obtained the pound of opium on January 22nd, but that none of petitioner's five keys fitted any of the apartments there (R. p. 169).

From the first day of the trial and throughout the trial the District Attorney attempted to get before the Court and jury the fact that Ying, after their arrest, made an accusatory statement implicating petitioner and that petitioner made no reply. The first witness through whom he attempted to develop this line of testimony was New York City Detective Monahan (R. pp. 73-5). This was done even though the witness had already testified that petitioner had, prior to hearing Ying's statement, denied any connection with Ying or the opium in question (R. p. 73).

Petitioner's attorney immediately objected and there was lengthy colloquy between the Court and both counsel in the presence and hearing of the jury, the Court going so far as to state during this colloquy:

> "Now I will say is it a principle of law that if a man hears some accusation made against him and he doesn't reply, is that evidence against him? * * *
>
> The Court: I understand from the witness—correct me if I don't state the testimony properly—the defendant was first asked and he said he never sold any opium or had anything to do with it. Then in his presence the other man says he got it from him. Is the fact that he didn't reply evidence against him?

Mr. Rosenthal: No, your Honor.

The Court: I think it may well be. I am not speaking about conspiracy" (R. p. 76).

The District Attorney also injected himself into this discussion and in the presence and hearing of the jury offered the following proposition of law:

"Mr. Martin: It is a matter for the jury to consider.

The Court: What is that?

Mr. Martin: I submit it is a matter for the jury to consider why he did not contradict" (R. p. 77).

The entire discussion on this question of evidence when it was first raised during the trial appears at pages 73 to 80 of the Record.

Although the District Attorney obviously knew better than the trial judge that evidence of this type was not admissible, he persisted in his efforts to get the evidence before the jury and tried to obtain Agent Lee's testimony (R. pp. 102-3), and that of the co-defendant Ying (R. pp. 217-21). It almost appears as a deliberate effort on the part of the District Attorney to "foul out". This subject matter and testimony is treated in detail under Point II of the within brief.

The petitioner, defendant below, not only took the stand in his own behalf (R. pp. 265-301), but also called character witnesses (R. pp. 239-41; 242-3).

Arthur Compton, an elderly gentleman, retired assistant manager of Marine Division of D.L. & W. Railroad lived right across the street from petitioner's combined laundry and home. He knew petitioner for five or six years and described the long hours and arduous work of petitioner. Mr. Compton stated petitioner's reputation was excellent

and that even his landlord spoke well of him (R. pp. 239-41).

Eng See Git knew petitioner for over fifteen years and was able to describe his reputation and good character among the people of the Chinese race as excellent (R. pp. 242-3).

Elsie Lee, his wife, came to petitioner's defense and testified concerning previous improper advances made to her by Ying, including the suggestion she divorce petitioner and marry him. She also described how she and petitioner eked out a living by working from 9 A.M. in the morning to midnight (R. p. 260).

On Lee denied any connection with Ying's dealings in opium (R. pp. 272, 274). He told the typical story of a hard working chinese laundryman who even at the age of 62 was seeking to advance and better himself (R. pp. 267-8). This was his first conflict in any form with the law.

His meetings with Ying on January 22nd and February 12th, 1950, both Sundays, in New York's Chinatown, were innocent and caused by Ying's luring him there to supposedly discuss the possible purchase of a wet wash laundry which Ying had told him was for sale. Ying claimed to have learned of it through his business of serving various chinese laundries in the metropolitan New Jersey area with foodstuffs and laundry supplies (R. pp. 223, 267).

SUMMARY OF ARGUMENT

I. The receipt by the trial Court, over the objection of the attorney for the petitioner, of the testimony of Federal Narcotic Agent Lee, of conversations allegedly had between Chin Poy, a Government special employee and the petitioner, which conversations it was claimed were overheard by Agent Lee through the use of a radio transmitter operated by Chin Poy and concealed upon his person and a radio receiver operated by Agent Lee, was error prejudicial to the petitioner and this testimony should have been excluded by reason of the fact that:

A. The method and means used in obtaining this evidence was in violation of petitioner's constitutional guarantee against illegal search and seizure granted him under the Fourth Amendment of the Constitution of the United States.

B. The admission of this evidence was in violation of the petitioner's right against self-incrimination granted him under the Fifth Amendment of the Constitution of the United States.

C. The Special Government Employee having obtained admission to petitioner's combined home and place of business by subterfuge and remained in his premises after having been ordered out by the petitioner, the entry was tantamount to and actually was a trespass upon the premises of petitioner and was, therefore, illegal and improper.

D. The within case is distinguishable from *Olmstead* v. *United States*, 277 U. S. 438, because here we have an actual trespass and invasion of the petitioner's premises by a Government Employee, Chin Poy, whereas in the

Olmstead case there was no trespass or entry upon the physical premises of the defendants and also because in the instant case the search made by use of electronic devices, to wit: the shortwave radio sending and receiving sets operated by government employees, and the seizure of the conversation alleged to have been held between petitioner and the Government Employee, Chin Poy, was of and concerning a conversation which by no stretch of the imagination can it be claimed the petitioner intended to project or permit to go beyond the immediate environs in which it was held and the ears of Chin Poy, whereas, in the *Olmstead* case by reason of the use of the telephone it was self evident that the defendants desired and intended to project their respective voices and words beyond the confines of the place or places where the words were uttered.

E. Even though this case is distinguishable from the *Olmstead* case and a reversal by this Court of the conviction in the within case may not necessarily involve an overruling of the *Olmstead* case, it is respectfully submitted that by reason of the growth of modern science and particularly of electronic devices and their use by employees and agencies of the Federal Government, this Honorable Court should, at this time, in order to preserve the guarantees contained within the Fourth and Fifth Amendments of the Constitution of the United States and to permit one living in the United States of America to feel and believe that their rights exist under the aforementioned amendments, re-examine and overrule the doctrine laid down in the *Olmstead* case and rule that the obtaining of evidence by Federal employees or agencies of personal and private conversations held within the four walls of a man's home, place of business or office, or over his telephone lines or other means of legal communication, should and must be

prevented and the offering into evidence of same be precluded as being in violation of the Fourth and Fifth Amendments of the Constitution of the United States. A ruling to the contrary by this Court, at this time, will, of necessity, emasculate the safeguards provided under these Amendments.

F. If this Court were to rule the evidence complained of was not obtained in violation of the Fourth Amendment, it should be excluded by reason of its very nature as being in violation of defendant's rights guaranteed him under the Fifth Amendment for permitting one, other than the person to whom the alleged statement was made by defendant, to testify concerning same, is the equivalent of forcing the defendant to testify against himself, which is prohibited under the Fifth Amendment.

G. The interests of justice in this case and in future cases which will be developed and presented in the various Federal Courts require that this Honorable Court exercise its inherent power to formulate rules of evidence in federal criminal trials and reject evidence obtained in the manner and by the devices used in the instant case, regardless of whether or not there be any finding that such evidence was obtained in violation of the Fourth and Fifth Amendments of the Constitution.

H. The use of the walkie-talkie device and the interception of the broadcast made over it was in violation of the provisions of §605 of Title 47 U. S. C., commonly known as the Federal Communications Act, and of the rules and regulations of the Federal Communications Commission.

II. The trial court committed serious and prejudicial error in admitting into evidence alleged accusatory statements made by petitioner's co-defendant, Gong Len Ying, subsequent to their arrest and to which petitioner made no response.

A. The admission of this evidence was particularly offensive in view of the testimony that when questioned separately petitioner had denied any connection with his co-defendant in respect to dealings in or about opium.

B. The weight of the evidence and the seriousness of the error was magnified by the constant and varied efforts of the District Attorney at the trial to get this evidence before the trial jury and also by the lengthy colloquy held by the trial court with counsel for both sides, in the hearing and in the absence of the jury, and the opinions and statements expressed by the trial Judge in the hearing and in the absence of the jury.

III. The charge of the trial court containing an erroneous statement of fact not only did not cure the error committed by the admission of the aforementioned evidence, but in fact greatly prejudiced the petitioner by submitting to the jury for its consideration a factual situation which did not exist.

A. The trial court repeatedly in its charge conceived a situation that was not in existence by instructing the jury that if they found that

> "*If before the arrest*[2] the petitioner made a denial, then it was not incumbent upon him to repeat his denial."

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[2] Emphasis Supplied.

There is absolutely no evidence in the Record concerning any questioning of the petitioner or statements made by him to officers prior to and before his arrest.

B. The efforts of the trial court to cure its error in the admission of this testimony by its charge to the jury could not possibly be sufficient to outweigh the harm done during the trial by the admission of the evidence in question, the constant reference to it by the trial court, the many and studied efforts of the District Attorney to get it before the trial jury. This is particularly true by reason of the weak case presented by the Government concerning the guilt of the petitioner herein.[3]

ARGUMENT

POINT I

The receipt of the testimony of Agent Lee concerning conversations between Chin Poy and petitioner allegedly overheard by means of the use of a radio transmitter operated by Chin Poy and a radio receiver operated by Agent Lee was error prejudicial to the petitioner.

Over the objection of counsel, federal narcotic agent Lee was permitted to testify to the receipt by radio of radio broadcasts of conversations alleged to have been had between Chin Poy, a special Government employee, and the petitioner. (R. p. 104). This testimony was objectionable and highly prejudicial to the petitioner and should

[3] See dissenting opinion of Frank, J., page 69 of appendix to Petition for Certiorari, 193 F. 2d 306.

have been excluded for three reasons which are discussed at length hereinafter.

This issue and question has never been previously ruled upon by the Supreme Court and the importance of the question involved is shown by the opening paragraph of the dissenting opinion of Frank, *C.J.*:[4]

(a) The evidence of the alleged conversations between Chin Po, Government Special Employee, and the petitioner, allegedly overheard by operation of shortwave radio was inadmissible having been obtained in violation of petitioner's constitutional guarantee against illegal search and seizure granted him under the Fourth Amendment of the Constitution of the United States and in violation of his right against self-incrimination granted him under the Fifth Amendment of the Constitution of the United States.

This question has been explored at great length in the dissenting opinion of Frank, *C.J.*, in the instant case (193 F. 2d 306, 311). The issue has been discussed so fully and lucidly by Judge Frank that it is with extreme difficulty at this time that petitioner's counsel restrains himself from offering the said dissenting opinion as petitioner's brief herein and attempts to enlarge upon same. That counsel for petitioner is not alone in the expression of the foregoing opinion concerning the clarity and forthrightness of the dissenting opinion of Judge Frank, is evidenced by the letter of March 14th, 1952, which counsel and the Solicitor General received from the American Civil Liberties Union, explaining why they did not make

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[4] "1: Sixty-five years ago, the case of a humble Chinese laundryman led to a decision involving the formulation of one of the most important constitutional principles. Today On Lee's case, as I see it, presents the violation of one of the most cherished constitutional rights, one which contributes substantially to the distinctive flavor of our democracy." Case referred to: *Yick Wo* v. *Hopkins* (118 U. S. 356). 193 F. 2d 306, 311.

application to file as amicus curiae.[5] In the instant case it appears that Chin Poy, a stool pigeon, described in the Record by narcotic agent Lee with the euphemism, "special employee" of the Government, went to the combination home and place of business of the petitioner in Hoboken, New Jersey, this being a chinese hand laundry with the store portion in the front of the premises and living quarters in the back rooms of the said premises, and engaged petitioner in conversation. Chin Poy was carrying, according to the testimony of Agent Lee, concealed upon his person, a microphone and radio transmitting equipment (R. pp. 103-4). Agent Lee stationed himself in the vestibule of a building about four doors removed from the petitioner's premises and by means of a radio receiving set working on the same wave length as the transmitter concealed upon the person of Chin Poy, allegedly heard the conversation had between Chin Poy and the petitioner. Agent Lee testified that his receiving set was concealed in a briefcase which he rested upon a radiator in the aforementioned vestibule and that he had in his ear a crystal device which enabled him to hear the broadcast.

He was permitted, over objection of petitioner's trial counsel (R. p. 104) to testify to the conversation he claimed to have heard between Chin Poy and the petitioner on March 30, 1950, approximately six weeks after petitioner's

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[5] The body of the letter in question reads as follows:

"Many thanks for your letter of March 4th. We are indeed most pleased that the United States Supreme Court has granted certiorari in this case. The only reason we are not attempting to file a brief amicus curiae in support of your position is that we feel that the dissenting opinion below states our feelings so precisely and presents the case so perfectly that there is absolutely nothing we could add in our own brief. You should feel free to quote from this letter in part or in its entirety in your brief or in your oral argument. The case has our full interest.

I am sending a copy of this letter to the Solicitor General."

arrest on February 12th, 1950. His testimony was based upon alleged refreshing of his recollection by notes claimed to have been made by Chin Poy (R. pp. 110-12, 117-18, 120). At one point Agent Lee stated he had lost his own original notes (R. pp. 118, 120-1) and at another point that he had misplaced them (R. pp. 186-7). No excuse or explanation was offered for the failure of the Government to produce Chin Poy at the trial (R. pp. 175-8). Agent Lee testified he attempted to use a recording device to record the conversation between the petitioner and Chin Poy, but the device was not in working order (R. pp. 109-10, 196-7). Petitioner testified that he had known Chin Poy for a number of years, he having been a former employee of petitioner, and that when Chin Poy called at his premises on or about March 30th, he had ordered him therefrom (R. pp. 295-8). He denied having any conversation with the said Chin Poy in respect to the facts of the instant case (R. p. 300).

It is the contention of the petitioner herein and it is respectfully submitted in his behalf, that the entry of the Government special employee upon the combined residence and business premises of the petitioner was a trespass and constituted an unreasonable and illegal search and seizure in violation of the guarantees contained within the Fourth Amendment, and the evidence thus obtained was inadmissible in view of the guarantees contained within the Fifth Amendment.

In the Brief submitted by the Solicitor General in opposition to the Petition for the Writ of Certiorari, it was urged by him that since the conversations objected to took place in petitioner's laundry to which the general public was invited, Chin Poy had entered legally with petitioner's permission and was in the nature of a licensee or invitee. In the absence of any proof to the contrary it is reasonable

to assume that a laundry, similar to the one operated by the petitioner herein in the State of New Jersey, is not regulated by Statute and is not the type of business which the State would regulate and require an owner to deal with and accept business from the general public, regardless of his pleasure or desire, as various State Laws do require in respect to hotels, inkeepers, restaurants and places of amusement. Certainly the petitioner was at liberty to accept or reject the business of any prospective customer and to regulate in his own premises whom might be admitted thereto and permitted to remain thereon and under what circumstances. There can be no dispute that petitioner did not know that Chin Poy was a Government employee and that he had concealed upon his person the microphone and radio transmitter allegedly carried by him.

The Government's brief completely ignored the testimony of petitioner and the comments of the trial court in respect to the visits of Chin Poy to the premises of petitioner. On cross examination concerning the visit of Chin Poy to his premises we find the petitioner testifying as follows:

> "* * * A. I never said anything like that to him. I never speak to a man that uses drugs and I chased him away from my place.
>
> Q. You say you chased him away? A. Yes, I chased him away" (R. 295).

Shortly thereafter the Court, in commenting upon the visits of Chin Poy to petitioner's premises, said:

> "The Court: He came back after that. He was not asked to come back, you used the word 'invite'. He did not make the statement 'come back'. He said that he came back of his own choice. That runs through his testimony" (R. 296).

Further on we find the following testimony of petitioner in respect to the visits of Chin Poy:

> "Q. Did you ask him to come over to see you at your laundry in Hoboken? A. Every time I chased him away.
>
> * * * * *
>
> A. I don't remember the exact day. All together he came to my laundry twice and every time I chased him away." (R. 298).

In reading the foregoing testimony of petitioner it must be borne in mind that this was developed upon cross examination by the District Attorney, who was in effect making the petitioner his own witness since it concerned collateral matter which had not been alluded to upon the direct testimony of the petitioner. Despite these statements and denial of petitioner as to invitation either general or express, to Chin Poy to visit him at petitioner's premises, the learned District Attorney did not see fit to produce Chin Poy to contradict the testimony of petitioner and it is respectfully submitted that, therefore, both the District Attorney and the jury were bound by these answers. It is further submitted that if one were to rule that Chin Poy had entered the premises lawfully as a licensee or invitee, because of the public nature of the premises, they must also find that by misusing his license through use of the microphone and radio transmitter he became a trespasser *ab initio*. This rule is embodied and well established in the old English Law.

In Treatise concerning Trespasses, by Carter, published in London in 1705, we find the following:

> "If any misuse a license given by the law, he shall be a trespasser ab initio. 8 Rep. 146, Six Carpenters' Case."

To quote from an unknown:

> "Where the law entry gives
> To abuse it, trespass ab initio is."

As recently as 1950 the Appellate Division for the Second Department of the Supreme Court of the State of New York affirmed a conviction for burglary where the defendant was convicted upon the theory that he had entered the premises of a department store, at an hour and time they were open to the public, with the intent of committing the crime of petit larceny by shoplifting and that, therefore, his entry into the premises constituted a breaking and entering for the purpose of committing a crime and that he was a trespasser *ab initio*. See *People* v. *Sine*, 277 App. Div. 908.

In the case of *Gouled* v. *United States*, 255 U. S. 298,[6] this Court had occasion to specifically rule and pass upon the question of the admission into evidence, of evidence obtained surreptitiously and by fraud on the part of a Government witness and in that case it was distinctly held that such evidence was obtained by means of an unreasonable search and seizure in violation of the Fourth Amendment and the admission of the evidence was a violation of the Fifth Amendment.

In the *Gouled* case at page 303 the Court said:

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this Court (in Boyd v. United States, 116 U. S. 616, in Weeks v. United States, 232 U. S. 383 and in Silverthorne Lumber Co. v. United States, 251 U. S.

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[6] In that case a federal employee entered the office of a friend, who was suspected of crime, and while there under the pretense of paying a friendly visit surreptitiously extracted and removed certain papers from the defendant's desk.

385) have declared the importance to political liberty and to the welfare of our country of due observance of the rights guaranteed under the Constitution by these Amendments. The effect of the decisions cited is that such rights are declared to be indispensable to the full enjoyment of personal security, personal liberty and private property; that they are to be regarded as of the very essence of constitutional liberty; and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen, the right, to trial by jury, to the writ of habeas corpus and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well intentioned but mistakenly over zealous executive officers."

Again at page 305 the Court said:

"It is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion."

The prevailing opinion in the appellate Court below makes much of the fact that the majority opinion of *Olmstead* v. *United States*, 277 U. S. 438, has never been directly questioned or overruled by this Court. It does, however, admit that in *Goldman* v. *United States*, 316 U. S. 129, 134, this Court, by dicta, indicated that if the dictaphone which had been placed in the office of one of the defendants by trespass had worked and had been the means of gathering the evidence offered by the Government, such evidence would have been inadmissible.

Where can you find a more clear cut instance of evidence being obtained by trespass than in the instant case? Here we have Chin Poy, with a radio transmitter concealed upon his person, in the premises of the petitioner. In the *Goldman* case we had a dictaphone physically placed upon the premises. In both cases we had a direct crossing of the threshold of the defendant by Government employees armed with instruments that would cause and permit other Government employees to, for all practical purposes, to accomplish the same as if they had secreted themselves physically upon the premises of the defendant.

Even if this Court were to hold at present that there was no disposition on their part to overrule the decision in *Olmstead* v. *United States,* cited *supra,* the distinction between the instant case and the *Olmstead* case is so marked that a ruling might well be made here in favor of petitioner without destroying the effect of or specifically overruling the Olmstead decision.

Chief Justice Taft in his opinion took occasion at five specific instances to point out there had been no intrusion, invasion, or trespass upon the physical premises of the defendant. He took pains to set this forth at page 457 of his opinion,[7] at the top of 464[8] of his opinion in discussing *Gouled* v. *United States* (cited *supra*), at the bottom of page 464,[9] and twice on page 466.[10]

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7 "The insertions were made without trespass upon any property of the defendants * * * the taps from house lines were made in the streets near the houses".

8 "There was actual entrance into the private quarters of defendant". Referring to *Gouled* v. *United States.*

9 "There was no entry of the houses or offices of the defendants".

10 "Here those who intercepted the projected voices were not in the house of either party to the conversation"
"* * * or an actual physical invasion of his house, or 'curtilage' for the purpose of making a seizure."

In the Solicitor General's brief in the *Olmstead* case, he pointed out to the Court that there had been no intrusion upon the premises of the defendants and at page 41, in discussing the provisions contained within the Fourth Amendment, said:

> "* * * but clearly the constitution does not forbid it unless it involves actual unlawful entry into a house."

The Time is Ripe for This Honorable Court to Overrule its Holding in the Olmstead Case.

Aside from any distinction between the *Olmstead* case and the instant case it is respectfully submitted that present day conditions require this Honorable Court to overrule its prior holding. Modern science and its many inventions have created a world non-existent at the time of the adoption of the Fourth Amendment of our Constitution. The reasons for the adoption hold as good today as they did in the time of our forefathers. While it is true that today we worry not about "Writs of Assistance" the fundamental underlying principle of a freedom loving people remains the same. The decisions of this Court are replete with the expressions of opinion by the Learned Judges who preceded us to the effect that our Constitution and its Amendments and the interpretation of same are elastic and must be viewed in the light of the conditions that exist at the time a particular question is presented. This was very ably expressed in the opinion of this Court in *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926) at 387:-

> "* * * While the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and dif-

ferent conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

As early as 1886, this Court in deciding nice distinctions offered by the Government as excuses for violation of a defendant's rights under the Fourth Amendment where in lieu of an illegal search and seizure a defendant was directed by Court Order to produce his books and records, the Court in *Boyd* v. *United States*, 116 U. S. 616, held that this was mere subterfuge to avoid the safeguards established by our Constitution and its Amendments, and said at page 635:

> "It may be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

One of the earliest cases involving interpretation of citizen's rights under the Fourth Amendment is *ex parte Jackson*, decided in 1877, 96 U. S. 727. This concerned the right to privacy and against inspection by postal authorities of letters and packages properly sealed and mailed. At page 733 the decision of this Court held:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outside form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be

secure in their papers against unreasonable searches and seizures extends to their papers thus closed against inspection wherever they may be."

If we are to continue to follow the doctrine asserted in the *Olmstead* case, namely, that the government may by use of finely shaded distinctions and devices circumvent the purpose and intent of the Fourth Amendment then the safeguards granted one under the Fourth Amendment and as interpreted by this Honorable Court in *Ex Parte Jackson* and the other cases becomes a nullity.

With the aid of modern science it is both conceivable and probable that Government employees and agencies might, through the use of fluoroscope or x-ray, be able to extract the very contents of a sealed letter or package without disturbing the seal contained thereon. To what avail would the words of the Fourth Amendment of the Constitution and of this Honorable Court, as expressed in *Ex Parte Jackson*, be to one whose letters or packages were so inspected and the contents thereof ascertained unless this Court is prepared, at this time, to say that the Courts have kept step with scientific developments and will still protect the principles and sustain the guarantees contained within the Fourth Amendment.

Since the decision in the *Olmstead* case, great strides have been made in the field of science concerning the use of electronic devices. This Court observed in the *Goldman* case, cited *supra*, that it is possible for Government agents to overhear and listen to one side of a telephonic conversation by the use of an induction coil, described therein as a "detectaphone". In fact, if the induction coil had been placed in a strategic position adjacent to the telephone wires, both sides of the conversation would have been overheard and yet there might not have been any violation of the prohibitions contained within §605, Title 47, U. S. C.,

the Federal Communications Act. It is now possible to place an induction coil or similar device near telephone lines at a distance from the office or home containing the telephone instrument and by use of another electronic device cause the conversation picked up by the induction coil to be broadcast shortwave to a person or persons situated some distance away from the original point of the use of the induction coil. Adherence to the majority opinion in the *Olmstead* case must, of necessity, lead to the circumvention of the provisions of the Federal Communications Act and the emasculation of the constitutional guarantees contained within the Fourth Amendment.

At the time the *Goldman* case was decided two of the Judges of this Court stated, in a memorandum opinion, that they were then prepared to overrule the rulings of the *Olmstead* case. The exact language of Chief Justice Stone and Mr. Justice Frankfurter appears at page 136 and is as follows:

> "Had a majority of the Court been willing at this time to overrule the Olmstead case we should have been happy to join them. But as they have declined to do so and as we think this case is indistinguishable in principle from Olmstead's, we have no occasion to repeat here the dissenting views in that case with which we agree."

In fact, the Solicitor General conceded at page 27 of his brief submitted in opposition in the *Goldman* case that the Constitution was not to be read with literal exactness and described it as a

> "living document for all times."

He further described the intent of the Fourth Amendment as being to protect the citizens against forms of abuses of the investigatory powers of the Government.

Again in *Byars* v. *United States*, 273 U. S. 28 (1926), at 33, this Court ruled that the Courts must not sanction the use of equivocal methods which might seem to escape the challenge of illegality. The exact words of the Court appearing at page 33 were as follows:

> "The Fourth Amendment was adopted in view of a long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurances against any revival of it so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially may seem to escape the challenge of illegality, but which in reality strike at the substance of the constitutional right."

In the minds of the general public and the daily press, especially as evidenced by the comic strips, wrongdoers are constantly adapting the instruments of modern science to their nefarious trades. A reader of the decisions eminating from this Honorable Court and an observer of the criminal trials held under Federal jurisdictions, however, must come to the conclusion that once this Court or any of the lower Federal Courts condemn a method or instrument used by federal investigatory agents as being in violation of a person's Constitutional rights, the said investigatory agencies are ready to jump into the breach with a new and more subtle method and means of attempting to circumvent and nullify the effects of rights granted under the Fourth and Fifth Amendments of our great Constitution and the interpretations placed upon the said Amendments by this Honorable Court.

The Courts of this country and particularly this Honorable Court, have repeatedly found it necessary to curtail the activities of law enforcement agencies and particularly

the means and methods used to gather evidence. In fact, in *United States* v. *Trupiano*, 334 U. S. 369, a case cited and approved in the majority opinion in the Court of Appeals below, this Court pointed out that it was still necessary for the Courts to lay down and enforce the rules concerning the gathering of evidence.[11]

The decisions of this Court and the Court below are replete with the fact that no distinction is to be made between search and seizure of a home or of a man's place of business.[12]

Chief Justice Swan's opinion below stresses the fact that there was nothing tangible seized or obtained in the instant case and urges that the Fourth Amendment of the Constitution intended solely to provide for the search of a place or the person and the seizure of tangible things.

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[11] This Court said at 705:

> "In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed".

Petitioner submits that in his case it is highly significant that the evidence complained of was not obtained under the circumstances outlined in the *Trupiano* case, there being no "excitement of the capture" of a suspected person. The petitioner complains of acts of the Government's agents taking place over 6 weeks after the arrest of the petitioner and being committed with deliberation and in apparent desire to bolster what must have appeared to even the most biased federal employee to be, to say the least, an extremely weak and unsustainable case against the petitioner. Continuing, this Court said in the *Trupiano* case:

> "To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible and subsequent history has confirmed their wisdom of that requirement."

[12] *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385;
Gouled v. *United States*, cited *supra*;
Go Bart Co. v. *United States*, 282 U. S. 344;
United States v. *Lefkowitz*, 285 U. S. 452.

Apparently the inherent weakness of this argument was realized and appreciated by the Solicitor General in preparing his Brief in opposition in the *Goldman* case, cited *supra*, for at page 25 of his Brief the Solicitor General said:

> "* * * accordingly the court has struck down as in violation of the Amendment every attempt, in whatever guise, either physically to invade the home or office *or** to seize any detachable property or effects."

This argument is particularly disturbing and unappealing to a practicing lawyer or doctor since all people engaged in the professions have, at some time or other, and unfortunately all too often, "had their brains picked", by a perfectly respectable friend or acquaintance. This friend or acquaintance would never give thought, secretly or publicly, to picking the pocket of anyone or stealing the wares of a merchant, but often has not hesitated to steal and take the stock in trade of his professional friend or acquaintance by seeking and obtaining advice with no intent to pay for same. Who can say that the ideas of a man or his words and every thought are not his secret property the same as his watch, pocketbook or papers. If we were to carry this to its logical conclusion it can be conceived that a Government agent under the circumstances and conditions existing in the instant case, might carry on a conversation with a mute who could not answer but would write out his replies and then we would have federal narcotic Agent Lee testifying to what he heard over the radio, namely the question or statements propounded by Chin Poy and producing and introducing into evidence the written replies made and given to Chin Poy

* Emphasis supplied.

by the mute. Can one say that under such circumstances that it would be permissible for Agent Lee to testify as to the oral statements made by Chin Poy, but that the written replies would be inadmissible into evidence because it was obtained by illegal search and seizure and something tangible or physical had been carried away as a result of that illegal search and seizure. Suppose one called at the office of a friend who had in his house a wire recording or dictaphone recording device, and that this device was secretly placed in operation by the caller while a conversation was being held between the two and that the caller then surreptitiously purloined the reel of wire or the record cut by the dictaphone. Would this evidence be inadmissible because the physical evidence of the spoken word had been obtained in violation of the Fourth Amendment or should it not be rejected from evidence because the very spoken word itself had been obtained in violation of the Fourth Amendment.

The prevailing opinion below and the Brief submitted by the Solictor General in opposition to the application for a Writ of Certiorari, cite with approval the case of *Davis* v. *United States*, 378 U. S. 582 as authority for the admissibility of evidence if obtained by subterfuge. A careful reading of this decision discloses that there was no subterfuge on the part of the Government agents and the evidence obtained was due to the invitation of the defendant to any and all persons including the general public to join with him in breaking the Law of the United States. The case of *United States* v. *Trupiano* (cited *supra*), is also cited in the prevailing opinion for authority that subterfuge is not a trespass. The distinctions between these cases and the instant case are so clearly set forth in the dissenting opinion of Frank, *C.J.* (193 F (2d) 311), that to belabor them further in this Brief would serve no purpose.

This Court only recently condemned surreptitious entry into a premises. In *United States* v. *Jesse Jeffers Jr.*, 342 U. S., the prevailing opinion of the Court said in discussing the entry by officers to make a search for the sole purpose of seizing contraband:

> "* * * the officers not only proceeded without a warrant or other legal authority, but their intrusion was conducted *surreptitiously* and by means denounced as criminal." (Emphasis supplied.)[13]

If the ruling in the instant case is permitted to stand no one will be safe in talking to a friend, acquaintance or business associate, no matter where such conversation might take place and particularly if it takes place within his home or place of business, unless and until he has conducted a thorough and complete investigation and search of the person of the party with whom he is conducting the conversation, or in police parlance, he has "frisked" the individual. If because of modern science we are to live under the constant threat of having our words and very thoughts broadcast to the world or to individuals we do not even know, then our theory of the inherent right of

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[13] A very interesting theory is presented by footnote 7 of the dissenting opinion of Murphy, *J.* in *Goldman* v. *United States*, 316 U. S. 129 at 140:

> "A warrant can be devised which would permit the use of a detectaphone, cf. Article 1 §12 of the New York Constitution (1938). And while a search warrant with its procedural safeguards has generally been regarded as prerequisite to the reasonableness of a search in those areas of essential privacy, such as the home, to which the Fourth Amendment applies (see *Agnello* v. *United States*, 269 U. S. 20, 32), some method of responsible supervision could be evolved for the use of the detectaphone which, like the valid search warrant, would adequately protect the privacy of the individual against irresponsible and indiscriminate intrusion by Government officers. (See Wigmore, Evidence, 3rd Ed. Vol. 8, §2184b, pp. 51-2.)

every member of our society in these United States to liberty becomes a mockery and travesty and mere cant.

It was suggested in the Brief submitted in opposition to the application for Certiorari that petitioner could not now be heard to protest concerning violation of his constitutional rights because not only were there two conversations held in the combined home and place of business of petitioner between him and the Government employee, Chin Poy, but also there was one conversation allegedly held on a public street in the City of New York and that in all three conversations the radio device complained of was used.

A careful reading of the Record discloses that this argument is fallacious and due to improper interpretation of the Record. Reference was made to pages 113 and 114 of the Record.

A careful reading of these pages discloses that the only time in his testimony that Agent Lee claimed petitioner had made an admission or referred to the transaction resulting in his arrest was at the first meeting between Chin Poy and the petitioner held in the petitioner's combined home and place of business.

When Agent Lee commenced testifying concerning the second alleged overheard conversation, which it is claimed took place on a street in New York City, we find objection being made by trial counsel and the following appears in the Record:

> "Mr. Rosenthal: The second conversation is not claimed, I do not believe, to have anything to do with the transaction charged in this indictment.
>
> The Court: I understand that" (R. 113-4).

It is, therefore, respectfully submitted that it is apparent that even if it were to be believed that the petitioner made

an admission on the street to Chin Poy that he was an agent for a syndicate, it did not in any manner refer to the transaction of January 22nd, 1950, which was the basis of the arrest and prosecution and no verdict of the jury could be claimed to be predicated upon this testimony.

Judicial approval of the conduct of the federal employees in the instant case can only produce repeated and worse offenses of this nature.

The dissenting opinion of Frank, *C.J.*, quotes at length from Orwell's "1984" and also cites references at length to the conditions existing within Nazi Germany when and where society had what is tantamount to thought control. The actions of the Government agents and employees in this case is what we hear as now occurring in those Countries beyond the "Iron Curtain" and certainly do not conform to the concepts within this Country of those

> "certain inalienable rights, that among these are life, liberty and the pursuit of happiness",

with which the second paragraph of our Declaration of Independence informs the world all men are endowed.

In *Neuslein* v. *District of Columbia*, 115 Fed. (2d) 699, Chief Justice Vinson, then a Circuit Judge, writing the prevailing opinion of the Court of Appeals for the District of Columbia held that where police officers trespassed by entering the home of the defendant and while upon the said premises obtained certain evidence through their power of observation and hearing while questioning the defendant, they had, in his opinion, conducted an illegal search and seizure. He said in part,

> "The crucial thing 'found' in this 'search', was a declaration of fact by the defendant that has become decidedly incriminating. * * * The Fourth and Fifth Amendments relate to different issues, but cases can

present facts which make the considerations behind these Amendments overlap. The officers violated the security of the defendant under the Fourth by unlawfully coming into his home and by placing him in custody. * * * But how did the officers find themselves in position to see and hear the defendant? The officers, in the pursuance of a general investigation, entered the home under no color of right."

The prevailing opinion in the Court of Appeals attempts to distinguish the instant case from the *Neuslein* case because of the fact that here the entry was through subterfuge and there it was a direct trespass. In view of the decisions in *Gouled* v. *United States* and *United States* v. *Jesse Jeffers Jr.*, both cited *supra*, it is respectfully submitted that there is no distinction between entrance made through trespass or by fraud and subterfuge and that in either or both cases a trespass in violation of the Fourth Amendment is committed.

(b) The evidence of the conversations between Chin Poy and petitioner having been obtained by means and use of radio were obtained in violation of §605, Title 47 U. S. C. and, therefore, inadmissible.

Prior to the decision in *Olmstead* v. *United States*, there was upon the Statute books a Law commonly known as "The Radio Act".[14] Subsequent to the decision in

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[14] Chapter 169, §27, Laws of 1927:

No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception to any person other than the addressee, his agent or attorney, or to a telephone, telegraph, cable or radio station employed or authorized to forward such radio communication to its destination or to proper accounting or distributing offices of the various communication centers over which the radio communication may be passed, or to a master

Olmstead v. *United States* and its ruling that the tapping of telephone wires and obtaining the conversations was legal and the evidence thus obtained admissible and not in violation of the Fourth Amendment, Congress passed what is known as the Federal Communications Act and by §605 of Title 47 U. S. C. made the interception or disclosure of messages transmitted by radio, telephone, or telegraph, illegal.[15]

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of a ship under which he is serving, or in response to a Subpoena issued by a Court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any persons and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof and knowing that such information was so obtained shall divulge or publish the contents, substance, purport, effect, or meaning thereof, or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; provided that this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast or transmitted by amateurs or others for the use of the general public or relating to ships in distress.

15 §605. Unauthorized publication or use of communications:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, con-

The Federal Communications Act closely parallels and incorporates most of the provisions of the former Radio Act. The prevailing opinion of the Court below dismissed as not sustainable the contention that the disclosure of the evidence overheard by means of radio by Agent Lee was forbidden by the Federal Communications Act. It quoted from the decision of this Court in *Goldman* v. *United States*, cited *supra*[16] and the Court found that there was no "interception" of a communication, the radio being used merely as a mechanical means of eavesdropping. By the very nature of radio you have a different condition presented in respect to interception than exists in telephone or telegraph wires. There cannot be and there is not in an interception of a radio broadcast the introduction of any mechanical device between the point of transmission and the point of interception. The very use of the transmitter causes the conversation to be broadcast upon the ether waves and anyone with a receiving set tuned to the

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tents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, ch. 652, §605, 48 Stat. 1103.)

[16] The protection intended and afforded by the Statute is of the means of communication and not of the secrecy of the conversation (316 U. S. 129, 133).

same wave length as the transmitter will receive the message even though it also is received at some other point by the intended recipient. The Radio Act and the Federal Communications Act both provide that no person shall either receive or use any information contained within a message for his own benefit or for the benefit of another not entitled thereto or having become acquainted with the contents of any message, divulge the same without the consent of the senders. In the instant case the petitioner never wittingly or knowingly broadcasted to Agent Lee so that it cannot be contended that federal narcotic Agent Lee was a proper recipient of any radio message from the petitioner nor did the petitioner at any time consent to the disclosure by Agent Lee of his broadcast although it is probably properly assumed that Chin Poy did so consent by the very use of the transmitter.[17] There is here, as was pointed out by the Circuit Court of Appeals for the Second Circuit, in the case of *United States* v. *Polakoff*, 112 Fed. (2d) 888, two senders and, therefore, interception or disclosure of the broadcast without the consent of the petitioner could not be held to be authorized under the exceptions contained within the Federal Communications Act.

(c) The inherent power of this Honorable Court to formulate rules of evidence in federal criminal trials guided by consideration of justice should cause the rejection of evidence obtained in the manner and by the devices used in the obtaining of evidence of the conversations had by Chin Poy and the petitioner.

This Court has ruled in *McNabb* v. *United States*, 318 U. S. 332 that in the interest of justice this Court can and should reject evidence improperly obtained by Federal officers, the Court stated at 341:

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[17] The Record is barren of any statement as to his consent.

> "The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those tried solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal Courts, see Nardone v. United States, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions * * * and in formulating such rules of evidence for federal criminal trials *the Court has been guided by consideration of justice not limited to the strict canons of evidentiary relevance.*"[18]

If this Honorable Court is of the opinion that the evidence in question was not obtained in violation of the petitioner's constitutional rights or in violation of the provisions of §605 of Title 47 U. S. C., could there be a more proper place for this Court to state and exercise what it has classified as its inherent right to formulate rules of criminal evidence and to direct the rejection of the evidence in the instant case and in the future all evidence obtained by the means and method employed by the Government in this case.

There can be no argument in opposition to the theory that if this Honorable Court finds that the evidence in question was obtained by the Government in violation of the terms of the Fourth Amendment, then of necessity it follows the introduction into evidence was a violation of the petitioner's rights under the Fifth Amendment of the Constitution.

Going one step further it is urged by petitioner that regardless of the ruling that might be made on the question

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[18] Emphasis supplied.

of whether this evidence was obtained contra to the Fourth Amendment in permitting of a third party, a Government agent, to testify to the hearsay of the alleged overheard conversation between the petitioner and the Government employee, Chin Poy, this evidence in effect made the petitioner, the defendant in the Court below, an unwitting and unwilling witness against himself. While it is true that he was not belabored with a baseball bat or forced at the point of a gun the fact remains that by the use of the walkie talkie radio, he was compelled to broadcast involuntarily a statement and thus it was possible for Government Agent Lee to testify as to what he claimed to have heard the petitioner, the defendant below, to have said. This, just as surely as if the statement had been extracted by force, compelled the defendant to testify against himself. In *Gouled* v. *United States,* 255 U. S. 298, at 306, the Court said:

> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidences against himself or whether such evidence be obtained by an alleged search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

Again in *Weeks* v. *United States,* 232 U. S. 383 (1914), the Court said at 391:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizure and enforced confession, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgment of the courts which are charged

at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.''

Particularly pertinent is the opinion of Mr. Justice Bradley, appearing at page 631 in *Boyd* v. *United States*, 116 U. S. 616 (1885):

> "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property is contrary to the principles of a free Government. It is abhorrent to the instincts of an Englishman; and it is abhorrent to the instincts of an American. It might suit the purposes of a despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

For the most recent judicial expression concerning the use of subterfuge in lieu of force in attempting to extract an admission or confession see *People* v. *Leyra*, 302 N. Y. 353.

POINT II

The admission into evidence of the accusatory statement made by co-defendant, Gong Len Ying, subsequent to arrest, was serious error prejudicial to petitioner.

The petitioner respectfully submits that serious and prejudicial error was committed by the Trial Court in permitting to be introduced into evidence, over the objection of the petitioner, statements alleged to have been

made by the co-defendant Ying in the presence and hearing of the defendant.

The District Attorney elicited from Government witness Detective Monahan, that he had questioned the petitioner and the co-defendant separately and that at that time the petitioner had denied any connection with the co-defendant or any participation in the sale of opium to or with the co-defendant (R. p. 73). There had been previous testimony in the case by Narcotic Agent Gim that the petitioner was asked whether or not he had given or sold a pound of opium to Ying and that he had said no (R. pp. 53, 63).

Detective Monahan then testified:

> "When I got there I put the two of them in one room and I asked the truck driver Gong where he got the opium on January 22nd that he sold to Agent Gim.
>
> The Court: What did he say?" (R. p. 73).

At this point the attorney for the petitioner objected to the question of the Court and the Court replied that it being a statement in the presence and hearing of petitioner it was admissible. The Court proceeded to examine the witness, Detective Monahan, in detail as appears at pages 74 and 75 of the Record. Counsel then asked for a direction from the Court to the jury to disregard the conversation had with Ying after his arrest, and discussion then took place between the Court and counsel from pages 75 to 80 of the Record. During this discussion in the presence and hearing of the jury the Court expressed the opinion that the failure of a co-defendant on a conspiracy charge to deny the accusatory admission made by another defendant after arrest might be considered by the jury as an admission (R. p. 78). The various statements made by the Court during the discussion in the presence and hearing of the jury could leave the jury with no impression other than

that the alleged admission made by Ying in the presence and hearing of the petitioner was good and binding evidence against the petitioner.

All of this took place on the very first morning of the trial and was constantly referred to and discussed subsequently during the trial, both in and out of the hearing and presence of the jury, by the Court, counsel for the petitioner and the District Attorney.

At page 90 of the Record it appears that Detective Monahan testified that the appellant always denied having any part in the transaction of the sale of the pound of opium in question. Again through Agent Lee, an effort was made to introduce the accusatory statement and admission made by the co-defendant Ying although it appeared affirmatively that the petitioner had denied that the opium in question was his (R. pp. 102-3).

It becomes apparent how important this point was and how it must have been magnified in the eyes of the trial jury when we realize that at the conclusion of the first day of the trial and again in the presence and hearing of the jury, the Trial Court, out of a clear sky, when discussing the adjournment for the day, stated:

> "The Court: I can give you the citations on admission by acquiescence" (R. p. 136).

On the morning of the second day of the trial at the opening of Court, the attorney for the petitioner proceeded to move to strike from the evidence the testimony which had been given concerning the admission claimed to have been made by Ying after arrest and offered the Court citations and quotations from various Federal cases. Suddenly, the Court decided that no further argument on the subject should be held in the presence of the jury and deferred argument until later in the case (R. pp. 137-39).

Although the District Attorney insisted that he had not offered this evidence as proof of an admission on the part of the petitioner he never lost an opportunity during the trial of trying to get same before the trial jury. At page 217 of the Record it appears that he asked the co-defendant Ying the following question, which he subsequently withdrew when objected to by the petitioner's attorney:

> "Q. Did somebody ask you where you obtained the opium that you gave Agent Gim?"

Again at page 219 he pursued the same question in a different form and the Court again engaged in a lengthy colloquy with counsel for petitioner. Pages 219 to 222 of the Record are concerned with the discussion had in the presence of the jury. Counsel for petitioner furnished the Court again with the citations which had previously been given on the morning of the second day of the trial. The remarks of the Court were highly prejudicial to the petitioner, some of the worst being as follows:

> "The Court: I am not talking before arrest or after arrest; I am talking about whether a case where a defendant did not open his mouth, whether that could be used against him.
>
> Mr. Rosenthal: They all say he does not have to open his mouth after arrest and that no inference can be drawn from that.
>
> The Court: Some say that and some say to the contrary. * * *
>
> The Court: It would be the natural impulse of a man to contradict" (R. p. 222).

At the conclusion of the government's case the attorney for petitioner again moved in respect to the admission of this evidence and further moved for a withdrawal of a

juror and a declaration of a mistrial. It is respectfully submitted that a motion for a mistrial should have, at that time, been granted since it should have been crystal clear to the Trail Court that serious prejudicial error had been committed by it, by the admission of the testimony in question and that nothing that would thereafter be done or said by the Trial Court or anyone else could possibly cure it. This point had been stressed to such an extent during the trial by the remarks referred to above by the Court, that the only result that could reasonably be expected was that the trial jury would believe that the failure of the petitioner to deny the accusatory statement of Ying was tantamount to an admission by the petitioner of the truthfulness of that statement.

Apparently the District Attorney knew that serious error had been committed and made no effort to justify the admission of this evidence by citation of any cases in support of the Court's theory. In fact, when the Judge asked him point blank for any supporting citations he attempted to evade and avoid the issue as appears from the following:

"The Court: You looked it up? You read it? You may read it a different way. What is your best case on it?

Mr. Martin: My position, Judge, is that we don't rely on that part of the testimony.

The Court: I don't care whether you do or not, I am trying the case according to my knowledge of how it should be tried. Why don't you rely on it? Because you think it's wrong? Now, speak up.

Mr. Martin: No, Judge.

The Court: If you introduced it in evidence why was it introduced if it does not amount to anything, what was the idea of it?

Mr. Martin: I did not want to withhold anything from the jury, I merely stated what occurred without asking the jury to draw any inference" (R. p. 254).

It is respectfully submitted that the Court erred in its rulings in respect to the admission and weight of the aforementioned evidence. The following cases all hold that no derogatory inference may be drawn from failure to deny an accusatory statement:

McCarthy v. *U. S.*, decided in the 6th Circuit, 25 Fed. 2nd 298;
Yep v. *U. S.*, 83 Fed. 2nd 41;
Skiskowski v. *U. S.*, 158 Fed. 2nd 177;
People v. *Rutigilano*, 261 N. Y. 103;
U. S. v. *Lo Biondo*, 135 Fed. 2nd 130 (decided in 2nd Circuit 4-22-43).

In *McCarthy* v. *U. S.*, cited and quoted in the *Lo Biondo* case, cited *supra*, the Court said at 299:

"To draw a derogatory inference from mere silence is to compel the defendant to testify and the customary form of warning should be changed and the respondent should be told 'If you say anything, it will be used against you, if you do not say anything, that will be used against you'.".

In *Yep* v. *U. S.*, cited *supra*, the Court at page 43 had this to say in respect to the silence of the defendant when the accusatory statements were made in his presence and hearing:

"At the time of the conversation between Finnis and Esther Haugh, Yep was under arrest.

> When one is under arrest or in custody charged with crime, he is under no duty to make any statement concerning the crime with which he is charged; and statements tending to implicate him made in his presence and hearing by others when he is under arrest or in custody, although not denied by him, are not admissible against him."

The majority opinion of Swan, *Ch.J.*, of the Court of Appeals, held that while the admission into evidence of the accusatory statement made by petitioner's co-defendant after arrest was erroneous (R. p. 164), the error had been cured by the charge of the Court and the petitioner was in no manner prejudiced. Contrast this with the opinion of Swan, *Ch.J.*, then *C.J.*, in *United States* v. *Corrigan, et al.*, 188 F. (2d) 641, in which case although the Court unanimously concluded that the evidence of the guilt as disclosed in the Record was overwhelming, reversal was required because of the erroneous admission of two exhibits which reflected on Corrigan's integrity. In his opinion Chief Justice Swan, then Circuit Judge, said at page 645:

> "Whether in fact the reports influenced the jury's verdict is, of course unknown and is immaterial, for an accused is entitled to have incompetent, prejudicial evidence excluded from the jury's consideration."

The majority opinion of the Appellate Court below offers also an interesting contrast to that by its former Chief Justice Learned Hand in the case of *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 Fed. (2nd) 54. In the instant case the prevailing opinion states:

> "The jury system is premised on the assumption that when the Judge instructs the jury what evidence

it may consider it will obey the instruction" (R. p. 413).

Judge Learned Hand in a lengthy decision discussing generally the effect of the jury system on our jurisprudence said, in *Skidmore* v. *Baltimore & Ohio R. Co.*, cited *supra*, at page 64:

> "The theory of the general verdict involves the assumption that the jury fully comprehends the Judge's instruction concerning the applicable substantive legal rules, yet often the Judge must state those rules to the jury with such niceties that many lawyers do not comprehend them and it is impossible that the jury can."[19]

As pointed out by Judge Frank in the dissenting opinion below, such error could be considered harmless, if at all, only where the Government had proven an extremely strong case, but that in the instant case the evidence and testimony concerning the guilt of petitioner was, to say the least, weak.

This Court in *Kotteakos* v. *United States*, 328 U. S. 750, in discussing so called "harmless" error, said at page 764:

> "And the question is not, were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or may reasonably be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

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[19] At page 65, footnote 25d, Judge Hand discusses the fact that appellate Courts are prone to hold so-called "procedural" errors harmless although they all too often probably and undoubtedly influence the verdict of the jury.

And again at page 765 this Court said:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The disturbing feature in the instant case is that the majority opinion in the Appellate Court below totally ignores the fact that the Trial Judge in attempting to correct and cure the error complained of unquestionably harmed the petitioner even greater than the original admission of the evidence had done. He misquoted and misstated the evidence and the rule of evidence. In charging on the point in question, which charge was apparently delivered as an afterthought and not as a part of the main charge, the Trial Judge twice informed the jury that the accusatory statement of the co-defendant was not binding upon the petitioner only if petitioner had denied *before arrest,* the facts contained within the accusatory statement made subsequent to arrest.[20]

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[20] "The Court: * * * I will charge the jury that *if before the arrest* the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest, in the presence of Monahan and possibly some of the other agents was told or heard Gong saying, 'You gave it to me; you delivered it to me,' then under the circumstances the defendant On Lee could remain silent and his silence would not be regarded as tacit admission that he did so" (R. pp. 360-1). (Emphasis supplied.)

"* * * Now, I modify that by this consideration: *if before the arrest* he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him 'I got it from you; you delivered it to me,' in that case I would

Sandwiched in between these incorrect and erroneous statements concerning the facts in the case[21] there is also an equally incorrect charge and statement concerning the Law.[22]

Analysis of this erroneous statement of fact and of law contained within the Court's Charge, placed a burden that did not exist within the four walls of this case and Record. Being unable to find, because none existed, any evidence that the defendant had entered a denial before his arrest, the jury was left with no choice but to follow the Court's erroneous expression of law appearing at Footnote "20" of the within brief and at page 362 of the Record, namely, that the petitioner's failure to deny the accusatory statement made by co-defendant Ying in his presence and hearing, was evidence of acquiescence in its truth.

The only case cited by the Government in its Brief in the Appellate Court below which would seem to hold contra to *United States* v. *Lo Biondo, Yep* v. *United States* and the various other cases cited *supra* as authority for the fact that a defendant after arrest is under no compulsion to affirm or deny an accusatory statement made by a co-

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say that silence did not constitute and acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he aready denied it that it was not so if the statement was made in his presence. He has denied it once and that would be sufficient" (R. pp. 361-2).

21 There is no proof in the Record of a denial by petitioner prior to arrest. The evidence in the Record discloses without question that there was a denial by petitioner, *subsequent* to arrest but prior to the accusatory statement of the co-defendant.

22 "* * * The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth" (R. p. 362).

defendant, and that no inference can be drawn by his failure to do so is the case of *Sparf and Hansen* v. *United States*, 156 U. S. 51. It is not clear from a reading of the opinion in that case as to whether or not the accusatory statement was made subsequent to actual arrest or during the course of an investigation concerning the circumstances of the commission of the crime charged and leading up to the actual arrest.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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